IN THE SUPREME COURT OF THE UNITED STATES

Gabriel Toombs, Appellant, vs. Citizens Bank of Waynesboro, Appellee.	No. 485, Oct. Term, 1923. Appeal from Supreme Court of Georgia.

STATEMENT AS TO THE JURISDICTION

Appellant, Gabriel Toombs, prior to 1919, acquired stock in Citizens Bank of Waynesboro, appellee, which was a state bank incorporated under the laws of Georgia in 1890. At the time of the incorporation of appellee, and at the time appellant acquired his stock therein, the statutes of Georgia provided that if a bank examiner finds that the capital stock of the bank has become impaired or reduced, he should require the bank to make good the impairment or reduction by transfer from surplus or undivided profits, or if there is no surplus or undivided profits, "Then by an assessment upon the stockholders thereof." No provision of law was made for levying such assessments, they were purely voluntary, and the penalty for failure to restore the impairment of capital was for the bank examiner to report the facts to the Governor, who was empowered to cause proceedings to be taken to forfeit the charter of the bank. (See Ga. Laws, 1895, p. 58.) After Appellant had acquired his stock, by the act of August 16, 1919, all existing laws being repealed, the General Assembly passed an act on this subject which provided that when the Superintendent of Banks should determine that the capital stock of a bank had been impaired as much as ten percent, he should require a transfer from surplus or undivided profits to restore the impairment; if the surplus and undivided profits were insufficient to restore the capital, the Superintendent of Banks was required to notify the bank to make good the impairment within sixty days "By an assessment upon the stockholders thereof, and it shall be the duty of the officers and directors of the bank receiving such notice to immediately call a special meeting of the stockholders for the purpose of making an assessment upon its stockholders sufficient to cover the impairment of the capital, payable in cash, at which meeting such assessment shall be made. By this act the bank was

authorized to sell so much of the stock at not less than par as would pay the assessment, or the bank might sue the stockholder for such assessment. (Ga. Laws 1919, p. 135-152, Art. VI, Secs. 1, 2, 3).

By the act of August 26, 1925, these sections of the act of 1919 were amended by adding to section 1 of art. VI. the language:—"At any such special meeting of the stockholders a majority of the stock outstanding at the time shall be deemed a quorum, and such assessment may be made upon a majority vote of the quorum present". Section 2 of Art. VI. was amended by adding to the end of the section the words: "The bank shall, in addition to the right herein given to sell said stock also have the right to sue the stockholder for the full amount of said assessment in the event that said stockholder shall fail to pay the assessment so levied, in lieu of the sale of such stock and at the option of the bank." The statute as amended does not require any form of notice to any stockholder of the special meeting required to be held to levy the assessment.

In 1926, the capital stock of appellee bank, which was $25,000.00, divided into 250 shares of $100.00 each, became impaired to the exetent of $55,522.76, the bank was taken charge of by the Superintendent of Banks, certain depositors wrote from their claims $30,422.76, and the Superintendent of Banks directed the officers to call a special meeting of stockholders to levy a stockholders assessment. A special meeting was held, at which 136 shares of the total 250 were present in person or by proxy. These shares voted for the assessment. Toombs was at that time a resident of Tampa, Fla. A letter was addressed to him at Washington, Ga. He does not appear to have received it. It does not appear that any by-law of the bank required notice to stockholders of their meetings. Suit was filed in Wilkes Superior Court on this assessment against Toombs. He demurred and answered, raising the issue that this statute having been passed after he acquired his stock, and the statute providing that a bare majority of the stockholders being present constituted a quorum, and a bare mapority of those present might levy an assessment, and after so levying the assessment, the bank might sue the stockholder on the assessment so made, and recover a judgment binding all his property, was a denial

of due process of law to him, contravening the constitution of the United States, because the statute did not require notice to each of the stockholders of the special meeting of the stockholders. (R. 15, 11.) The Superior Court having found against him, appellant took the case to the Supreme Court of Georgia, which court in section 4 of its opinion (R. 30-31-32) on Sept 24, 1929 (R 29,) determined that the statute was not unconstitutional and void because it violates the due process clauses of the State and Federal constitutions. Appeal was allowed tothe Supreme Court of the United States Oct. 15, 1929. (R 1.)

Jurisdiction is claimed in the Supreme Court of the United States under sec. 344 (a) of Title 28, United States Code, in this case because the appeal is from a judgment of the highest court of the State of Georgia in which a decision in the suit could be had, where is drawn in question the validity of a statute of the state of Georgia on the ground of its being repugnant to the constitution of the United States and the decision was in favor of its validity.

Counsel have been able to find, and believe that, no case has arisen in which a statute providing for special stockholders meetings in corporations has been attacked as void for want of due process of law, because there was no requirement in the statute for notice to all the stockholders of the special meeting provided for in the statute. This case does not involve the right of the state to amend the charter of the bank. The exact issue is, must the statute providing for these assessments provide for notice to the stockholder of the meetings at which the assessment is levied. No such notice is provided inthis statute. Suit is required to be brought in a court, but the suit required was a suit on the asessment itself, such suit does not grant to the stockholder due process of law, because if the stockholders meeting was held as reqiured by the statute, it was a binding obligation, made so by the statute, the judicial act of determining whether the assessment should be levied was performed by the stockholders, and notice, efficient to provide an opportunity to him to be heard by all the stockholders, was the notice that was necessary to constitute due processof law. The court in which suit was required to be brought was the mere ministerial agent for the enforcement of the previously completed

judicial act of the stockholders in levying the assessment. Under the statute the special meeting of the stockholders was a tribunal created by the State for the purpose of creating a binding liability on each stockholder actually to pay such assessment as a majority of those present might levy. The legislation is vicious because it permits a bare majority of the stockholders to hold a meeting of which the minority have no notice and at such meeting levy an assessment binding all the stockholders, by the vote of a mere majority of those present, which might be a very small minority of the entire body of stockholders.

Appellant prays that if the appeal be determined to be improvidently sought under the section of the Code cited, that the papers on which the appeal was allowed may be regarded and acted on as a petition for certiorari under Section 344 (c) of Title 28, United States Code.

Respectfully submitted.

W. A. SLATON,
Solicitor for Appellant.